

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

MEMBER SERVICES, INC., *et al.*,

Plaintiffs,

vs.

Civ. Action No.

3:06-CV-1164 (TJM/DEP)

SECURITY MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK, *et al.*,

Defendants.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFFS:

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PATRICK FITZGERALD, III, ESQ.

HISCOCK, BARCLAY LAW FIRM
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DOUGLAS J. NASH, ESQ.
GABRIEL M. NUGENT, ESQ.

FOR DEFENDANT SCHMITT-
SUSSMAN ENTERPRISES, INC.:

HURWITZ, SAGARIN LAW FIRM
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DAVID A. SLOSSBERG, ESQ.
BRIAN WHEELIN, ESQ.

FOR REMAINING DEFENDANTS:

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GEORGE R. McGUIRE, ESQ.
DAVID L. NOCILLY, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in connection with this action are various motions and cross-motions. The process was initiated by the plaintiffs' filing of a motion in which they seek a preclusion order as well as costs and attorneys' fees pursuant to Rule 37 of the Federal Rules of Civil Procedure, based upon defendants' alleged non-compliance with prior discovery orders of the court including, *inter alia*, those issued on March 12, 2007 (Dkt. No. 27) and October 3, 2007 (Dkt. No. 67). Dkt. No. 175. In addition to opposing that motion, all of the defendants with the exception of Schmitt-Sussman Enterprises, Inc. (collectively, the "SML Defendants") have cross-moved for costs and attorneys' fees as well as an order striking a supplemental report of plaintiffs' expert, Michael R.

Elliott, disclosed on or about May 20, 2009. Dkt. No. 190. Also before the court are plaintiffs' motion for leave to amend their complaint and/or to dismiss their claims against the individual defendants pursuant, *inter alia*, to Rule 41(a)(2) of the Federal Rules of Civil Procedure (Dkt. No. 185) and the SML Defendants' motion to disqualify Hiscock & Barclay, LLP from representing the plaintiffs in this action based upon an alleged conflict of interest (Dkt. No. 192).

Oral argument was heard with regard to the various pending motions, which were vigorously contested, on July 29, 2009. Following the close of argument I issued an oral decision addressing each of the parties' respective motions.

Based upon the foregoing and the court's bench decision, which is incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Plaintiffs' motion for a preclusion order (Dkt. No. 175) is DENIED.
- 2) The applications of both plaintiffs and the SML Defendants for an award of costs and attorneys' fees is DENIED.
- 3) The SML Defendants' motion to disqualify the firm of Hiscock

& Barclay LLP from representing the plaintiffs in this action (Dkt. No. 192) is GRANTED.

4) The SML defendants' motion to strike the report dated on or about May 20, 2009 of Michael Elliott (Dkt. No. 190) is DENIED, provided, however, that the SML Defendants shall be afforded an opportunity, on or before August 21, 2009, to disclose to plaintiffs a report of its expert in response to the May 20 Elliott report, and further that expert Elliott be made available for deposition at a mutually convenient date and time on or before September 11, 2009, either in the Northern District of New York or, at plaintiffs' expense, in California.

5) Plaintiffs' application for leave to amend and/or for an order dismissing their claims against the individual defendants in this case (Dkt. No. 185) is DENIED, without prejudice to the right to apply for such relief, either on stipulation of all parties or by motion made to the assigned district judge, the Hon. Thomas J. McAvoy.

6) Plaintiffs' oral request for an order compelling further discovery on the part of the SML Defendants is DENIED.

7) The clerk is directed to promptly forward copies of this order to the parties electronically, pursuant to the court's local rules.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: July 30, 2009
Syracuse, NY